

MEMORANDUM TO: Faryar Shrizad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Antidumping
Investigation of Carbon and Certain Alloy Steel Wire Rod
from Moldova: Moldova Steel Works (MSW)

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in response to Carbon and Certain Alloy Steel Wire Rod from Moldova: Notice of Preliminary Determination of Sales at Less Than Fair Value, 67 FR 17401 (April 10, 2002) ("Preliminary Determination"). As a result of our analysis, we have made no changes to the margin calculation from the Preliminary Determination. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation:

1. Use of Facts Available
2. Basis of Adverse Facts Available
3. Request for Revocation of NME Status
4. Market Economy Responses

Comment 1: Use of facts available

The petitioner contends that MSW's refusal to allow the Department to conduct an on-site verification of its questionnaire responses prevented necessary information from being obtained for the record. As such, the petitioner maintains that the Department should use facts available in the final determination pursuant to section 776(a)(2) of the Tariff Act of 1930, as amended (the Act). Further, the petitioner argues that MSW's refusal to allow an on-site verification of its responses demonstrates that MSW has failed to cooperate by not acting the best of its ability in this investigation. As such, the petitioner supports the application of facts available with adverse inferences pursuant to section 776(b) of the Act. MSW did not comment on this issue.

Department Position: Section 776(b) of the Act provides that adverse inferences may be used against a party that has failed to cooperate by not acting to the best of its ability to comply with requests for information. (See also Statement of Administrative Action, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994) ("SAA").) MSW's failure to participate fully in the investigation following the Preliminary Determination and refusal to permit verification of its information demonstrates that MSW has failed to cooperate to the best of its ability in this investigation.

As in past cases, when a company provides information that cannot be verified and fails to cooperate to the best of its ability, it is appropriate for the Department to assign to that company a rate based on adverse inferences. For a complete discussion of our analysis, see memorandum to Joseph A. Spetrini Determination of Facts Available for Moldova Steel Works in Carbon and Certain Alloy Steel Wire Rod from Moldova, dated August 23, 2002.

Comment 2: Basis of adverse fact available

The petitioner maintains that the Department should use as adverse facts available, the highest CONNUM-specific rate calculated from MSW's data for the Preliminary Determination. The petitioner argues that only the use of the highest CONNUM-specific rate satisfies the legal requirement that a respondent shall not benefit from its lack of cooperation; that is, a respondent who refuses to permit verification shall not be allowed to obtain, by failing to cooperate, a margin that is lower than the margin the respondent would have otherwise obtained by cooperating fully and permitting verification of its data.

The petitioner contends that by definition, the margin assigned as total adverse facts available in the final determination must include some element of adversity. The petitioner cites to Ta Chen Stainless Steel Pipe, Inc. v. United States, Court No. 97-08-01344, slip op. 00-107, (CIT August 25, 2000), in which the CIT noted that one "of the purposes of using adverse facts available is to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"; and Kompass Food Trading Int'l v. United States, Slip. Op. 00-90 (CIT July 31, 2000), in which the CIT affirmed the Department's assignment of the highest calculated rate in the proceeding as total adverse facts available to a respondent that ceased cooperating in the review. MSW did not comment on this issue.

The petitioner also contends that this rationale is similarly expressed in relevant administrative precedent. The petitioner cites to Certain Welded Stainless Steel Pipe From Taiwan; Final Results of Administrative Review, 62 FR 37543 (July 14, 1997), in which the Department declined to assign the existing cash deposit rate as adverse facts available, "as this would amount to rewarding" the uncooperative respondent; Stainless Steel Plate in Coils From Taiwan; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 67 FR 5789 (February 7, 2002), in which the Department stated consistent "with Department practice in cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b)(3) of the Act, as adverse facts available we have applied a margin based on

the highest margin from this or any prior segment of the proceeding;” and Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review, 64 FR 43650 (August 11, 1999), in which the Department found that in “situations involving non-cooperative respondents of this type, it is the Department’s normal practice to select as adverse facts available the highest margin from the current or any prior segment of the same proceeding.”

The petitioner maintains that the Moldova-wide rate from the Preliminary Determination reflects the Department’s dumping analysis undertaken with no adverse inferences. As such, the petitioner argues that continuing to apply the Moldova-wide rate to MSW would not satisfy the pertinent legislative, judicial, and administrative requirements that the rate assigned to MSW reflect an element of adversity. Rather, the petitioner claims that only the use of the highest calculated CONNUM-specific rate from the Preliminary Determination would introduce the legally required adverse inference into the Department’s final determination.

Department Position: We agree with the petitioner, in part. The record shows that, by refusing to permit verification, MSW has not cooperated to the best of its ability. Therefore, the Department has determined that, in selecting from among facts otherwise available with respect to MSW, an adverse inference is warranted. As facts otherwise available, we are making an adverse inference and assigning to MSW the weighted-average margin of 369.10 percent calculated for the Preliminary Determination based on MSW’s submitted information. This rate is the higher of the petition margin recalculated for the Notice of Initiation of Antidumping Duty Investigations: Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela, 66 FR 50164, 50165 (October 2, 2001), or the highest margin calculated in this proceeding. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom, 61 FR 51411, 51412 (October 2, 1996). Thus, by assigning the significantly higher calculated rate from the Preliminary Determination, rather than the lower recalculated petition rate, the Department considers that the rate contains an element of adversity.

We note that the Department assigns a single NME rate to the NME entity, unless an exporter can demonstrate eligibility for a separate rate. As noted in the Preliminary Determination, the Department was unable to assign a separate rate to MSW, the only Moldovan producer and exporter to sell the subject merchandise to the United States during the POI. Since MSW was the only Moldovan producer and exporter of the subject merchandise which responded to the Department’s questionnaire, and we have no reason to believe that there are other non-responding exporters/producers of the subject merchandise during the POI, we calculated a Moldova-wide rate based on the weighted-average margin using MSW’s information. This Moldova-wide rate will apply to all entries of subject merchandise.

Comment 3: Request for Revocation of NME Status

MSW argues that conditioning market-economy treatment of the Republic of Moldova (ROM) on the support of the Government of the Republic of Moldova (GORM) violates the most-favored nation (“MFN”) principle of GATT Article I, which requires WTO Members to apply trade-related regulations equally and unconditionally to like products originating in WTO Member countries.

MSW argues that the MFN principle obligates the Department to apply in this investigation the same standards that it applies when investigating like products from other WTO Member countries, regardless of GORM’s support. MSW maintains that WTO rules require the Department to apply unconditionally the same methodologies to like products imported from all WTO Members, including the ROM.

MSW argues that the Department owes this obligation not just to the ROM but to all other WTO members as well. MSW maintains that the GORM’s position rests on the fallacy that its WTO rights are solely a bilateral matter between ROM and the United States. MSW maintains that the GORM’s WTO rights are multilateral rights that must equally benefit all WTO members regardless of the bilateral trade relationship in question. Thus, MSW maintains that the Department’s application of NME methodologies to products imported from the ROM would violate fundamental rights of all WTO members, not just those of the GORM.

The petitioner contends that the Department has properly declined to initiate an NME revocation inquiry in this proceeding. The petitioner maintains, due to the macroeconomic nature of NME revocation, the Department’s prerequisite to any NME revocation inquiry is a request from the sovereign state at issue that such an inquiry be conducted. The petitioner argues that the Department’s threshold requirement that the sovereign state itself request revocation of NME status reflects reasonable and sound policies. The petitioner notes that in this investigation, the GORM explicitly opposes revocation of NME status for the ROM in its entirety. The petitioner contends that the GORM’s opposition alone suffices to end the Department’s NME revocation inquiry.

The petitioner argues that the ROM’s membership in the WTO does not preclude its continued designation as an NME, and/or the Department’s use of factors of production methodology to calculate normal value. Rather, the petitioner contends that the Department’s ability to designate a country as an NME under section 771(18) of the Act is fully consistent with Article VI of the General Agreement on Trade and Tariffs (GATT). The petitioner contends that Interpretative Note 2 *Ad* Paragraph 1 of GATT Article VI does not describe the preconditions for designating a country as an NME and that the designation of a country as an NME is left to the legal and political processes of each GATT signatory.

Department Position: To the extent that the MSW and the petitioner raise arguments based on the WTO Agreements, we note that U.S. law, as implemented through the URAA, is consistent with the WTO obligations of the United States. See SAA at 669.

When the Department makes the determination of whether a country is an NME country, the country's NME status continues until the Department revokes it. See section 771(18)(C)(i) of the Act. The Department has treated Moldova as a non-market-economy (NME) country in all past antidumping investigations. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Steel Reinforcing Bars from Moldova, 66 FR 33525 (June 22, 2001). In determining whether to revoke a country's NME status, pursuant to section 771(18)(B)(vi) of the Act, the Department will consider "such other factors as the administering authority considers appropriate." One of those factors has been government support for treating the country as a market economy.

It has been the Department's practice that the relevant government must express its support for the revocation of a country's NME status in order for the Department to revoke that country's NME status: the governments of Slovakia, Latvia, and the Czech Republic, the three countries cited by MSW, each expressed support for NME revocation. See Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Steel Concrete Reinforcing Bars from Latvia, 66 FR 8323, 8324 (January 30, 2001); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From the Czech Republic, 65 FR 5599, 5600 (February 4, 2000); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Slovakia, 65 FR 1110 (January 7, 2000). In the past, the Department has declined to revoke NME status, when there has been no clear statement of government support. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Hot-Rolled Carbon Steel flat Products from Romania, 66 FR 22194, 22195 (May 3, 2001)("[T]he Department issued a letter outlining the proper form and procedures for making a request for market economy status. . . . There has been no further communication from the Romanian government on this issue.") The record of this investigation shows that the GORM does not support the treatment of the entire country as a market economy pursuant to MSW's request. Therefore, in accordance with section 771(18) of the Act, we continue to consider the ROM as an NME country.

Comment 4: Market Economy Responses

While MSW concedes that the Government of the Republic of Moldova (GORM) does not support revocation of Moldova's non-market-economy status for the entire Republic of Moldova (ROM), MSW argues that the GORM's position has no effect on the Department's obligation under U.S. law to apply market-economy methodologies to MSW. MSW maintains that, even if the Department's practice conditions revocation of NME status on the support of the government in question, this practice is legally irrelevant in this case because NME revocation is not required for the application of a market-economy dumping margin. MSW claims that under section 773(c)(1)(B) of the Act, the Department may base normal value on factors of production only if the Department "finds that available information does not permit the normal value of the subject merchandise to be determined" according to a company's actual home-market or third-country

prices, or constructed value. MSW maintains that it has provided the Department with the “available information” it needs to calculate a dumping margin based on the company’s actual prices and costs. Moreover, MSW argues that as an exporter from a World Trade Organization (WTO) member country, it has the right to a market-economy dumping calculation based on that information.

MSW argues that in past antidumping investigations involving the Slovak Republic, the Czech Republic and Latvia, the Department issued the market-economy questionnaire to respondent exporters upon receipt of the requests for revocation of NME status by the relevant governments. MSW maintains that in those cases, the Department worked closely with the exporters and their counsel to ensure that they were able to manage the substantial burdens of documenting the case for NME revocation while responding to two sets of questionnaires. MSW argues that the Department’s departure from practice in this investigation is inexcusable and has impeded MSW’s firm commitment to cooperate and to pursue its right, as an exporter from a WTO member country, to receive a dumping margin calculated using the standard methodologies set forth in the Antidumping Agreement.

MSW argues that it has, in voluntarily submitting complete responses to the Department’s market-economy antidumping questionnaire, already provided the Department with the “available information” it needs to calculate a market-economy dumping margin. MSW claims that it has, as an exporter from a WTO member country, an unequivocal right to a market-economy dumping calculation based on that information. MSW maintains that this right applies also as a matter of U.S. law because it does not raise any inconsistencies with the antidumping statute. Thus, MSW argues that the Department may not, with respect to MSW, make the threshold determination under section 773(c)(1)(B) of the Act on which a factors of production methodology depends. Moreover, MSW argues that, even if the Department ultimately determines that revocation of the ROM’s NME status is not appropriate, the Department must still grant MSW a dumping margin based on market-economy methodology in the Final Determination.

The petitioner argues that regardless of what MSW submitted on the record of the investigation, or how MSW characterizes its submissions, it is the Department’s designation of the ROM as an NME under section 771(18) of the Act that satisfies section 773(c)(1)(B) of the Act. The petitioner contends that the sole exception to the use of the factors of production to calculate normal value methodology in an NME dumping case is when, through a separate inquiry, the Department determines that a market-oriented industry (MOI) exists. The petitioner notes that MSW has not requested an MOI inquiry in this investigation. Therefore, the petitioner contends that MSW’s presentation of unsolicited “market economy” responses does not require the Department to apply market-economy normal value calculation methodologies when determining whether MSW sold subject merchandise in the United States at less than fair value.

Department Position: The Department's continued designation of the ROM as an NME under section 771(18) of the Act provides the basis for the Department to calculate normal value using factors of production under section 773(c)(1)(B) of the Act. The mere fact that MSW has submitted unsolicited market economy responses in no way requires the Department to apply market-economy normal value calculation methodologies in determining and dumping margin for MSW.

Recommendation: Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margins in the Federal Register.

Agree_____ Disagree _____

Faryar Shirzad
Assistant Secretary
for Import Administration

Date